Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. ...73-1521

ANTHONY LOSCHIAVO,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Your petitioner, Anthony Loschiavo, by his attorney, Jacob W. Friedman, respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit, rendered March 14, 1974, affirming a judgment of conviction in the United States District for the Southern District of New York. The latter judgment had been rendered on December 11, 1973, after trial before Metzner, D. J., and a jury. The crime of which petitioner was convicted was bribery, in alleged violation of 18 U. S. Code Sec. 201-b(2). The conviction related to the second count of the indictment. On the first count (conspiracy) petitioner was acquitted, and was likewise acquitted on the fourth count (perjury). The jury failed to reach a verdict as to the third count (perjury). The sentence imposed was imprisonment for one year and a fine of $5,000.

Opinion Below

No opinion was rendered by the Court of Appeals in affirming the conviction.

Jurisdiction

The judgment of the Court of Appeals was entered on March 14, 1974.

The jurisdiction of the United States District Court was invoked as involving alleged violation of 18 U. S. Code Sec. 201-b(2).

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. Code Sec. 1254(1).

Questions Presented for Review

1. Does a federal court have jurisdiction under the statute—18 U. S. Code Sec. 201-b(2)—where the individual claimed to have been bribed is not an agent or employee of the federal government?

2. If a person authorized by federal and state prosecuting officials practices electronic surveillance upon a defendant, without the latter's knowledge and without warnings or admonitions, is the evidence so obtained admissible?

3. May a defendant subjected to extortion and entrapment be convicted of bribery?

4. Despite the Government's eliciting new matter upon its redirect examination of its chief witness, may recross examination properly be denied?

5. Was it error to receive evidence that the wife and family of the Government's chief witness had been threatened, although admittedly such threats could not be attributed to defendant?

Statement of Case

The substance of the bribery charge was that petitioner paid $20,000 to certain officials of the Model Cities Administration of the City of New York in order to induce Model Cities to take a lease of a building which he owned; and that inasmuch as Model Cities derived its funds from the federal government, such bribery was a violation of federal law. The only material witness implicating petitioner was one Pedro Morales, an assistant to an acting director of Model Cities. Morales had been arrested on charges of conspiring to defraud the United States involving the receipt of bribes in connection with another Model Cities program. Morales had repeatedly attempted to exact money from petitioner, and, when arrested decided to cooperate in an investigation; equipped with a concealed transmitter and tape recorder, he engaged in extended conversation with petitioner, the product of which was placed in evidence.

Reasons for Allowance of Writ

1. Inasmuch as Morales and his colleague (John Sanders), the alleged recipients of the bribe, were admittedly "employees of the New York Model Cities Administration" (and so described in the indictment), no transaction with them could properly be regarded as coming within the scope of 18 U. S. Code Sec. 201-b(2), under which petitioner was convicted. "It is axiomatic that in order to allege an offense under Section 201, the person

receiving the alleged bribe must have been an officer of the government and have been acting for the government in his official capacity." *United States* v. *Lubowski* (D. C. Ill.), 277 F. Supp. 713. The statute is clearly limited to federal employees. *United States* v. *Heffler* (C. A. 3), 402 F. 2d 924, cert. den. 394 U. S. 946. The government may not engage in unlimited involvement simply for the sake of prosecuting criminals, and a prosecution not clearly authorized by statute will be dismissed as an abuse of federal power. *United States* v. *Archer* (C. A. 2), 486 F. 2d 670. In the recent holding in *Rewis* v. *United States*, 401 U. S. 808, Mr. Justice Marshall stressed the tendency to limit federal prosecutions to the strict language of the pertinent statute.

2. Petitioner has consistently urged that the reception in evidence of two tape-recorded conversations between him ond Morales violated his rights under the Fourth Amendment. Of course, we are familiar with the closely divided holding of this Court in *United States* v. *White*, 401 U. S. 745, and the difficult and vexatious questions raised by situations of this type. A fundamental feature of the case at bar is that Morales was at the time of his conversations (recorded) with petitioner committed to a single course: to wit, he had "decided to cooperate in an undercover investigation" being conducted by the United States Attorney (to quote the latter's language). In short, he was identifying himself in status with an instrumentality of the prosecution. If a police officer or a prosecutor were to interrogate a suspected perpetrator of a crime, there can be no question of the primary duty to apprise the potential defendant of his right to refuse to speak and his right to counsel—as established by a series of recent holdings of this Court so familiar as to render citation superfluous. These rules give rise to the important

question of whether such advice and admonition may be dispensed with when the questioner has disguised his true purpose and is actually acting for and on behalf of prosecuting authorities. Clarification of the law on this point would patently be helpful.

3. A careful scrutiny of the record impels the conclusion that Morales was in the processing of extorting money from petitioner. From this status he was recruited by law enforcement officials to engage in electronic surveillance to obtain incriminating admissions. Such persons are forbidden to instigate criminal acts by otherwise innocent individuals in order to lure them to commit crimes. To justify a conviction a defendant must exhibit a predisposition to commit the charged offense. *United States* v. *Russell,* 411 U. S. 423.

4. As has been indicated, Morales was virtually the only material witness against petitioner. On redirect examination he was asked a number of additional questions which would have opened new and hitherto unexplored avenues of inquiry. Thus he now testified regarding the location and rent of his apartment; his reasons for maintaining it; the duration of his residence there; for how long a period he was receiving compensation from the United States Marshal; the support of his family; threats to his wife and daughter; his tape recording of many conversations under the supervision of the United States Attorney's office; his purchase of certain rugs from petitioner; the discussion of alterations and other details with respect to a building owned by petitioner; the cost thereof; the instructions given by an Assistant United States Attorney as to the subject-matter of Morales' prospective conversations with petitioner; his last meeting with petitioner, among other significant matters (180-188). When

petitioner's counsel rose to cross-examine the witness on these points, the trial court forbade ony interrogation, and exception was duly taken (188). This denial was clearly reversible error. Even a partial curtailment of this right is fatal to a conviction. *Smith* v. *Illinois*, 390 U. S. 129; *Alford* v. *United States*, 282 U. S. 267. As Mr. Justice Stone pointed out in the latter case: "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. See also *Pointer* v. *Texas*, 380 U. S. 400, and *Douglas* v. *Alabama*, 380 U. S. 415.

5. When Morales testified that he changed his residence address, there was manifestly no reason for inquiring as to his reasons therefor, especially since they had no connection with or relation to any act or conduct of petitioner. Nevertheless, when he was asked by the prosecutor whether there was "any special reason" why he "had to be relocated," an objection to the question was overruled and he answered (182-183), "There was absolute threats to my wife and my daughters." The record is devoid of the slightest suggestion that the alleged threats emanated from or were in any manner the responsibility of petitioner. Nevertheless, the conclusion is irresistible that the sole purpose of introducing such testimony was to prejudice the jury and that it necessarily had such effect. This alone may well have operated to impair the fairness of the trial, and to induce an adverse verdict.

While petitioner herein is naturally pursuing all remedies to exonerate him of wrongdoing, and in the strongest feeling of his innocence, which his counsel shares, the Court will appreciate that the case involves meritorious and certainly arguable questions of a character likely to arise

in other prosecutions and calling for authoritative disposition. The issues are such as courts are likely to be concerned with in future cases. Ultimate appellate review would be most helpful in furnishing sound guidelines to aid in the just resolution of similar controversies and to prevent injustice arising from the possible repetition of the indicated errors.

The present petition is filed in good faith and not for purposes of delay.

Conclusion

For all the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated New York, N. Y., April 8, 1974.

Respectfully submitted,

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ALBERT FINKELSTEIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribery, in violation of 18 U.S.C. 201(b). He was sentenced to one year's imprisonment and fined $5,000. The court of appeals affirmed without opinion.[1]

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[1]Petitioner was acquitted on counts of conspiracy to defraud the United States and perjury. The jury was unable to reach a verdict on a third count, also charging perjury. A co-defendant, Andrew Storms, pleaded guilty before trial to the conspiracy count and was sentenced to four months' imprisonment. Another co-defendant, Kingdon DeWitt, pleaded guilty to a perjury count and was sentenced to six months' imprisonment. Two other co-conspirators, John Sanders and Pedro Morales, were charged separately with respect to the events resulting in petitioner's prosecution and with two other unrelated conspiracies to defraud the government. Both pleaded guilty. Sanders received a two year prison term; Morales, a government witness in several other prosecutions, has not yet been sentenced.

The evidence showed that in the fall of 1971, John Sanders, then the Acting Director of the Harlem-East Harlem Model Cities Program, directed Pedro Morales, his assistant, to inspect a building owned by petitioner as a possible site for storing Model Cities' sanitation equipment. After determining that the building was suitable, Morales and Sanders decided to ask petitioner for a $15,000 payment in return for entering into a lease on his building that would be profitable to him (Tr. 33-41). After several meetings between petitioner, Sanders, and Morales, petitioner agreed to the proposed illicit transaction and accordingly paid Morales $5,000 in November 1971. This money was delivered by co-defendant Storms, a contractor with whom petitioner had arranged to renovate the building at government expense, pursuant to the government lease (Tr. 41-49). The lease was not immediately forthcoming from Sanders' office, and in February 1972, petitioner personally gave Morales another $2,500 on learning that Storms had withheld that amount from $7,500 originally given him by petitioner for delivery to Morales and Sanders (Tr. 50-55). On May 9, 1972, a five year lease was executed at $108,400 per year, and renovations costing $257,000 were approved (Tr. 57, 62). Petitioner then transferred to Morales another $7,500 in cash (Tr. 63-64).

On September 1, 1972, Morales was arrested on an unrelated charge of conspiracy to defraud the United States involving the receipt of bribes in connection with a Model Cities summer camp program. He then agreed to cooperate in an undercover investigation of corruption within the Model Cities Administration (Tr. 66-68). He approached petitioner on September 26, carrying a concealed transmitter and tape recorder, and indicated that he had been

called before a federal grand jury and wanted to formulate his testimony so as not to incriminate anyone. Petitioner then reviewed the bribery transaction with him; this recorded conversation was played for the jury as corroboration of Morales' testimony (Tr. 70-82).

1. Petitioner first argues that the district court was without jurisdiction in his case because 18 U.S.C. 201 (b) allegedly applies only to the bribery of federal employees, whereas Sanders and Morales were employed by the New York Model Cities Administration. This position is not well taken. Section 201(a), in proscribing the bribery of a "public official," defines such official in part as "an officer or employee or *person acting for or on behalf of the United States,* or any department, agency or branch of Government thereof" (emphasis added). While Sanders and Morales were technically employed by the City of New York, the control and supervision exercised by the federal Department of Housing and Urban Development (HUD) over the city's Model Cities Administration was such that they were properly regarded below as persons "acting for or on behalf of the United States."

Under the Model Cities program, federal funds are distributed to qualified cities in accordance with a highly detailed budget approved by HUD. See 42 U.S.C. 3301, *et seq.* New York City was required to maintain records in accordance with HUD requirements, to document all costs of the program, to submit to regular audit and inspection by HUD of all its records, including contracts, invoices, payrolls and records of personnel, and to comply with HUD guidelines concerning conflict of interest, discrimination in employment and labor standards. HUD also issued guidelines to the Model Cities program concerning management capabilities of its employees, required the City to give preference in hiring to area residents

and to maintain a certain level of competence among Model Cities employees, and reserved the right to review the hiring of any individual and to comment on his performance. The federal government paid 100% of the costs of approved projects and activities of the program and 80% of the cost of administration. In the instant case HUD specifically authorized an expenditure of federal funds to cover the cost of a neighborhood cleanup program in the Harlem-East Harlem Model Cities area, including the rental of a sanitation facility; thus HUD funded all of the rental due petitioner and 80% of the salaries of Sanders and Morales. This pervasive involvement of the federal government in the Model Cities program of which Sanders and Morales were a part—though they were technically employed by New York City—supports petitioner's conviction of bribery of persons "acting for or on behalf of the United States."

The applicability of federal fraud statutes to local activities funded by the federal government has long been recognized. See, *e.g., United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, where this Court held a statute proscribing the making of false claims for payment against the federal government applicable to certain individuals who had presented false claims to local municipalities funded under the federal Public Works Administration. See also *United States* v. *Candella,* 487 F. 2d 1223 (C.A. 2), where 18 U.S.C. 1001, which prohibits the making of false statements "in any matter within the jurisdiction of any department or agency of the United States * * * * " was held applicable to false claims for moving expenses under an urban renewal project because, although the claims were presented to the New York City government, the City received reimbursement from the federal government.

2. Petitioner also contends that the prosecution improperly elicited from Morales testimony that he had changed his residence because of threats directed towards his wife and daughters. This question, however, was asked by the government during redirect examination in order to clarify matters first brought out during petitioner's cross-examination of Morales. Petitioner had asked Morales if he was receiving subsistence payments from the govenment, to which he responded affirmatively (Tr. 126-127). On redirect examination, the prosecution merely elicited from Morales the explanation that due to threats to his family he was forced to move, thus causing his wife to resign her employment and necessitating government subsistence (Tr. 182-183). The jury was aware that Morales was involved in other government investigations (Tr. 183), and the prosecution did not attempt to suggest that petitioner had made these threats. Indeed, Morales testified that he did not believe petitioner was the source of the warnings (Tr. 172).

Similarly without merit is petitioner's related argument that the trial court erred in not permitting him to examine Morales further after the brief redirect examination.[2] The trial court determined, and the transcript reveals, that the information elicited on redirect examination was only clarification of facts discussed during cross-examination (Tr. 180-188). As this Court noted in *Alford* v. *United States*, 282 U.S. 687, 694, "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted." In the circumstances here, where

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[2]After the government's direct examination of Morales, petitioner cross-examined him for three hours (Tr. 86-180, 188).

cross examination had been extensive, the trial court's considered judgment that the matter was exhausted was reasonable.

3. Finally, petitioner argues that Morales' recording of their conversation constituted an illegal seizure. Recording of conversations with the consent of one of the parties, however, is as a legitimate investigative technique. See *United States* v. *White,* 401 U.S. 745; *On Lee* v. *United States* 343 U.S. 747; *Lopez* v. *United States,* 373 U.S. 427; 18 U.S.C. 2511 (2)(c) and (d). Similarly without merit is petitioner's claim of entrapment, for the bribery here had already taken place when Morales, newly recruited as a government informant, recorded the conversation in which petitioner reviewed his participation in the crime. See *United States* v. *Russell,* 411 U.S. 423.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.